COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

CITY OF CORRY POLICE DEPARTMENT BARGAINING UNIT	:	
	:	Case No. PF-C-11-24-W
v.	:	
CITY OF CORRY	:	

PROPOSED DECISION AND ORDER

On February 15, 2011, the City of Corry Police Department Bargaining Unit (Complainant or Union) filed a charge of unfair labor practices with the Pennsylvania Labor Relations Board (Board) against the City of Corry (Respondent or City), alleging that the City violated Sections 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read in pari materia with Act 111.

On March 3, 2011, the Secretary of the Board issued a Complaint and Notice of Hearing in which the matter was assigned to a conciliator for the purpose of resolving the matters in dispute through the mutual agreement of the parties and May 11, 2011, in Pittsburgh was scheduled as the time and place of hearing if necessary.

A hearing was necessary, and was held as scheduled, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Post hearing briefs were submitted on July 6, 2011 and July 27, 2011.

The examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The City of Corry is a third class city of the Commonwealth of Pennsylvania and is an employer within the meaning of Section 3 (f) of the PLRA.

2. The City of Corry Police Department Bargaining Unit (Union) is a labor organization within the meaning of Section 3(f) of the PLRA.

3. The City and the Union have been parties to several collective bargaining agreements covering the issues of wages, hours and terms and conditions of employment of the police officers of the City. (N.T. 17-18, Complainant’s Exhibit 1, Respondent’s Exhibits 2,3 and 4)

4. That the bargaining unit as recognized by the agreement includes only full-time paid police officers and excludes the Chief and ranks of sergeant and above. (N.T. 17-18, Complainant’s Exhibit 1)

5. The most recent collective bargaining agreement covers the period from 2009 to 2011. (N.T. 17-18, Complainant’s Exhibit 1)

6. The collective bargaining agreement includes a provision at “Article 5.3.1. Work Week,” stating,

> The standard workweek shall be forty (40) hours consisting of five (5) eight (8) hour work shifts. A minimum of twenty-four (24) hours will be allowed between scheduled shift starting times for each

> employee, except in recognized emergency situations. An emergency situation is defined as an unexpected event that needs immediate attention. The work shifts shall be Monday thru [sic] Sunday 7:00 AM to 3:00 PM; 3:00 PM to 11:00 PM; 11:00 PM to 7:00 AM; and on Thursday, Friday and Saturday 8:00 PM to 4:00 AM; unless the operational needs of the department require a shift to be altered or a special shift to be added.

(N.T. 17-18, Complainant's Exhibit 1)

7. The collective bargaining agreement includes a provision at "Article 5.3.4 Four Week Schedule," stating,

> A work schedule for the entire new year shall be made available to the employees in December of the prior year. The four week work shift schedule, for all employees, will be established and posted in a manner so as to be continuous throughout the year with a new week posted (added) to the end to replace each week that passes. Seniority shall have preference in changing the posted work schedule. It is understood that changes to the posted schedule are required from time to time to accommodate leave requests, court appearances and emergency situations, but due diligence shall be exercised in making changes to the posted schedule.

(N.T. 17-18, Complainant's Exhibit 1)

8. The collective bargaining agreement includes a provision at "Article 6.4.3 Scheduling," stating,

> When a vacation or personal day request is approved, the officers scheduled days off, immediately prior to and subsequent to the vacation period, shall not be changed.

(N.T. 17-18, Complainant's Exhibit 1)

9. Corporal Tommy Lee Beebe, Jr, is a sixteen year member of the police department. He testified that he uses Article 6.4.3 to "lock in" vacation days when the schedule is made, which enabled them to make for longer weekends when the vacation day was just before or after a weekend off. (N.T. 34-39)

10. Corporal Beebe became aware of an issue with this "locking in" after October 21, 2010 when he returned to work when was advised that Lieutenant Shopene had made a comment that Beebe was not going to get any weekends off. (N.T. 40)

11. On December 22, 2010, the issue was addressed again, when Beebe, Sergeant Kevin Goode and Corporal Gary Hunt met with Chief Fred Corbett at the request of the officers. (N.T. 40-42)

12. The meeting was called because a new schedule had been posted for 2011, which did not give all of the officers weekends off on a rotating basis. Only Sergeant Goode and Patrolmen Tony McIntyre and Markus Morrison e received regular weekends off, due to other considerations. Goode is the school resource officer, who works Monday through Friday, 7:00 AM to 3:00 PM for the benefit of the school district. Morrison and

McIntyre are enlisted in the National Guard and the City must allow them to attend one mandatory weekend training a month, as required by federal law. (N.T. 40-42)

13. Beebe testified that there is nothing in the collective bargaining agreement that guarantees some time off on weekends. (N.T. 107)

14. Beebe testified that in the sixteen years in the department, he has worked under three different scheduling templates that provided for different rotations. (N.T. 58-61)

DISCUSSION

The Board has issued a complaint on the Union's charge of unfair labor practices. The Union's specification of charges alleges that the City of Corry violated the PLRA and Act 111when it unilaterally changed "a rotating work schedule" for the police department "under their collective bargaining agreement which provided for a forty (40) hour work week consisting of five (5) eight (8) hour work shifts from Monday thru [sic] Sunday 7:00 AM to 3:00 PM; 3:00 PM to 11:00 PM; 11:00 PM to 7:00 AM; and on Thursday, Friday and Saturday 8:00 PM to 4:00 AM. Said rotating schedule allowed the officers to enjoy weekends off." The new schedule violated the PLRA and Act 111 by its alleged "changing prior practice and denying Police Officers weekends off, with the exception of Sgt. Kevin E. Goode, who is the Police School Resource Officer, and Ptlm. Markus A. Morrison and Ptlm. Tony R. McIntyre, who serve in the U.S. National Guard."

From the specification of charges, the evidence presented at the hearing and the Union's brief, two theories emerge for the charge: that there was a unilateral change to the collective bargaining agreement provisions on scheduling rotating weekends off, or, in the alternative, that there was a unilateral change in the established past practice of scheduling rotating weekends off.

The Union requests that the Board issue a cease and desist order; issue an order that the City is to return to the original scheduling for the police department that was in effect before the new schedule that took effect January 9, 2011 so that the benefit of weekends off could be provided via rotation for all members of the bargaining unit and issue an order directing that the City to refrain from refusing to bargain with the Union.

The Union, as the complainant, has the burden to show that an unfair labor practice has been committed and the proof must be by substantial and legally credible evidence. Pennsylvania Labor Relations Board v. Kaufman Department Stores, 345 Pa. 398, 29 A.2d 90 (1942).

The Board addressed the issue of police schedule changes in Upper Saucon Township, 620 A.2d 71 (Pa. Cmwlth. 1993) and its analysis was affirmed by the Commonwealth Court. The Board held that the employer committed an unfair labor practice when it made a unilateral change to the department wide schedule followed by the employer for the past ten years. The Court adopted the Board's reasoning that the unique facts of the schedule change at issue in that case amounted to a change in "terms and conditions of employment" and was therefore a "mandatory subject of bargaining under Act 111." Id at 75. Before the change, the employer scheduled the police on a rotating "7-2","7-2","6-4" schedule in which officers worked seven day time shifts followed by two days off; seven middle-hour shifts (second shift),followed by two days off; and six night shifts (third shift), followed by four days off. Under the rotating shift schedule, officers received 13 days off per year (known as "Kelly" days) so that their yearly hours of work did not exceed 2,080. Each officer received Saturday off every fourth week.

In March, 1991, the Township implemented a new steady shift system for police officers, known as a "5-2" schedule. Officers work five consecutive days or nights and are then off for two days. Individual officers select their combination of days off based on seniority and the assignments are permanent. For some officers, shift selections (e.g. second or third shift) are also permanent and the new system does not provide for shift

differentials. The new system did not increase the number of hours per day, week or year that an officer works.

In the present case, the Union's first theory of proving a unilateral change is that the change violated the collective bargaining agreement. However, the union has not met its burden of proof. Kaufman Department Stores, supra. The collective bargaining agreement contains nothing to help the Union's case. The evidence does not show that anything in the collective bargaining agreement guaranteeing rotating weekends off. Also, Corporal Beebe admitted this during his testimony in this hearing. Accordingly, there is no basis for using the collective bargaining agreement as the foundation for making a unilateral change case.

The Union's second theory of proving a unilateral change is that the new schedule deviated from a binding past practice. The Union contends that it was an established past practice to give all of the officers the benefit of weekends off on a rotating basis. A term and condition of employment does not have to be set forth explicitly in the collective bargaining agreement; an established "past practice" may constitute a term and condition of employment. See, Lawrence County, 5 PPER 74 (Final Order, 1974), citing NLRB v. Katz, 369 U.S.736 (1962). In Plumstead Township, 28 PPER ¶ 28220 (Final Order, 1997) aff'd, 713 A.2d 730 (Pa. Cmwlth. 1998), the Board adopted our Supreme Court's definition of past practice as set forth in County of Allegheny vs. Allegheny Prison Employes Independent Union, 476 Pa. 27, 381 A.2d 849 (1977). "A custom or practice is not something which arises simply because a given course of conduct has been pursued by management or the employees on one or more occasions. … It must be shown to be the accepted course of conduct characteristically repeated in response to the given set of underlying circumstances." Id at 34, n. 12.

However, the evidence is not clear that there was a department wide schedule of rotating weekends off so as to constitute a binding past practice. The Union offered evidence of the last three years' schedules to show that there was a department wide basis for rotating weekends off. However, Corporal Beebe testified that in the sixteen years he worked in the department, the scheduling template changed three times, a different history of consistent past practice than in Upper Saucon Township, supra. Given this evidence, the facts do not meet the Board's test for proving the existence of a binding past practice. Accordingly, the Union has no basis for using the past practice argument as the foundation for making a unilateral change case.

Without either the contractual language or a past practice serving as the basis for finding a unilateral change, it is difficult to conclude that the City has violated its duty to bargain of a mandatory subject of bargainng and committed an unfair labor practice within the meaning of Section 6(1)(a) and (e) of the PLRA and Act 111.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds as follows:

1. The City of Corry is an employer under section 3(c) of the PLRA as read in pari materia with Act 111.

2. The City of Corry Police Department Bargaining Unit is a labor organization under section 3(f) of the PLRA as read in pari materia with Act 111.

3. The Board has jurisdiction over the parties.

4. The City of Corry has not committed an unfair labor practice under section 6(1)(a) and (e) of the PLRA as read in pari materia with Act 111.

ORDER

In view of the foregoing and in order to effectuate the policies of the PLRA as read in pari materia with Act 111, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the charges of unfair labor practices is dismissed and the complaint rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this thirteenth day of February, 2012.

PENNSYLVANIA LABOR RELATIONS BOARD

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Thomas P. Leonard, Hearing Examiner